

# EXHIBIT D

1 MICHAEL J. BRADY (SBN 40693)  
 2 TODD A. ROBERTS (SBN 129722)  
 3 ROPERS, MAJESKI, KOHN & BENTLEY  
 4 1001 Marshall Street, Suite 300  
 5 Redwood City, CA 94063-2052  
 6 Telephone: (650) 364-8200  
 7 Facsimile: (650) 780-1701  
 8 Email: troberts@rmkb.com

9 Attorneys for Plaintiff  
 10 GREAT AMERICAN INSURANCE COMPANY  
 11 OF NEW YORK

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 13 COUNTY OF SANTA CLARA

14 GREAT AMERICAN INSURANCE  
 15 COMPANY OF NEW YORK,

16 Plaintiff,

17 v.

18 NVIDIA CORPORATION, a Delaware  
 19 corporation, and DOES 1 through 500,

20 Defendants.

CASE NO. **109CV133413**  
 COMPLAINT FOR DECLARATORY  
 RELIEF AND RESCISSION

By Fax

21 Plaintiff GREAT AMERICAN INSURANCE COMPANY OF NEW YORK (hereinafter  
 22 "GREAT AMERICAN") complains of defendants, and each of them, as follows:

23 1. Plaintiff GREAT AMERICAN INSURANCE COMPANY OF NEW YORK is  
 24 organized under the laws of the State of New York, having its principal place of business in  
 25 Cincinnati, Ohio. GREAT AMERICAN is licensed to conduct insurance business in the State of  
 26 California.

27 2. Defendant NVIDIA CORPORATION is organized under the laws of the State of  
 28 Delaware, having its principal place of business in Santa Clara, California.

3. The identities of DOES 1 through 500 are presently unknown to plaintiff and are  
 parties interested in the determination of the outcome of this dispute. When the true and correct  
 names of said DOES are ascertained, plaintiff will seek to amend this complaint.

RCI/5231035.2/RS

- 1 -

COMPLAINT FOR DECLARATORY RELIEF AND RESCISSION

Ropers Majeski Kohn & Bentley  
 A Professional Corporation  
 Redwood City

FILED Santa Clara Co  
 01/27/09 12:38pm  
 David H. Yamasaki  
 Chief Executive Officer  
 By: jcaonnguyen DTSCIV  
 R#200900008593  
 CK \$350.00  
 TL \$350.00  
 Case: 1-09-CV-133413

J. Cao-Nguyen

1           4.       Venue is proper in the County of Santa Clara since the policy of excess liability  
2 insurance at issue was delivered to NVIDIA at its corporate office in Santa Clara, and NVIDIA  
3 maintains its corporate headquarters in Santa Clara County.

4           5.       Defendant NVIDIA is the inventor of the GPU, a high-performance processor that  
5 generates interactive graphics, among other things, for personal desktop and laptop computers.  
6 NVIDIA is a publicly traded company and employs over 5000 individuals worldwide.

7           6.       At least as far back as August 2007, NVIDIA became aware that certain NVIDIA  
8 products incorporated into notebook computers were failing at much higher than normal rates and  
9 began "troubleshooting" the problems with certain of its customers. The failure of the NVIDIA  
10 chips caused the notebook computers to perform in an unsatisfactory manner or, in many cases,  
11 not at all. These facts were not made known publicly until it was announced by an NVIDIA  
12 executive at the Citigroup Technology Conference in September, 2008.

13          7.       On or about November 2007, as a direct result of the failure of NVIDIA chips,  
14 Hewlett-Packard Company (hereinafter "HP") implemented a Limited Warranty Service  
15 Enhancement Program due to the epidemic field failure rates experienced by purchasers of its  
16 notebook computers that incorporated NVIDIA GPUs. GREAT AMERICAN is informed and  
17 believes and thereon alleges that HP put NVIDIA on notice of not only the epidemic failures of  
18 the notebook computers caused by NVIDIA, but also its intention to implement a Limited  
19 Warranty Service Enhancement Program at a substantial cost that should be borne by NVIDIA.

20          8.       On November 14, 2007, a class action lawsuit was filed by Nathan Nygren against  
21 Hewlett-Packard Company ("HP") in the United States District Court for the Northern District of  
22 California arising out of the failure of HP notebooks. (N.D. Cal. 5:2007cv05793.) GREAT  
23 AMERICAN is informed and believes and thereon alleges that HP provided notice to NVIDIA of  
24 the class action lawsuit and/or that NVIDIA was otherwise aware that the problems with NVIDIA  
25 chips had resulted in the filing of the lawsuit, and that HP would seek indemnification from  
26 NVIDIA for all loss and damage associated with the suit.

27          9.       GREAT AMERICAN is informed and believes and thereon alleges that in or about  
28 November, 2007, NVIDIA had knowledge of the HP Limited Warranty Service Enhancement

1 Program, the massive problems being experienced by HP customers, and the assertion of claims  
2 by HP against NVIDIA arising out of those problems. NVIDIA knew or should have known that  
3 until the root cause of the problem was determined, its chips would continue to fail in the future,  
4 including the period in which the GREAT AMERICAN excess liability policy (Policy No.  
5 EXE2194521) was in effect.

6 10. GREAT AMERICAN is further informed and believes and thereon alleges that  
7 NVIDIA knew or should have known that its chips would continue to fail until the root cause was  
8 determined and corrective measures were taken to remedy the problems. Further, NVIDIA knew  
9 that the same material set used in the chips that were failing in the HP notebooks were being used  
10 in other NVIDIA chips and, therefore, the high field failures would be experienced in the future,  
11 including after the time GREAT AMERICAN issued its excess liability policy. (Policy No.  
12 EXE2194521.)

13 11. GREAT AMERICAN is informed and believes and thereon alleges that as a result  
14 of the epidemic field failures of NVIDIA chips, NVIDIA's troubleshooting in August of 2007,  
15 HP's implementation of a Limited Warranty Service Enhancement Program, HP's assertion of a  
16 claim against NVIDIA in or around November of 2007, and the filing of the Nygren class action  
17 complaint, among other things, that NVIDIA provided notice to its 2007-2008 general liability  
18 and professional liability insurers of a claim or circumstance that might implicate their policy  
19 coverage months before the GREAT AMERICAN excess liability policy inception. (Policy No.  
20 EXE2194521.)

21 12. In late January 2008, NVIDIA Corporation, through its agent Marsh Risk &  
22 Insurance Services, requested that GREAT AMERICAN consider offering NVIDIA an excess  
23 liability policy. NVIDIA intended for GREAT AMERICAN to rely on the representations and  
24 communications, and emphasized that NVIDIA's past losses were minimal and that it would be a  
25 good risk. Based on these representations, and the other information communicated to GREAT  
26 AMERICAN by or on behalf of NVIDIA, GREAT AMERICAN elected to underwrite the  
27 account and issue a quote.

28 13. On or about January 20, 2008, GREAT AMERICAN offered an excess insurance

Ropers Majeski Kohn & Bentley  
A Professional Corporation  
Redwood City

1 proposal to NVIDIA CORPORATION for \$25 million excess liability coverage for the policy  
2 period January 31, 2008, to January 31, 2009. The GREAT AMERICAN policy was to be issued  
3 as excess over a \$1 million primary policy issued by National Union Fire Insurance Company of  
4 Pittsburg, PA, an excess liability umbrella policy with liability limits of \$25 million issued by  
5 National Union, and an excess liability policy issued by American Guarantee & Liability  
6 Insurance Company subject to a \$25 million policy limit.

7 14. In reliance on the representations made in connection with NVIDIA's insurance  
8 submission by Marsh, GREAT AMERICAN issued excess liability Policy No. EXE2194521  
9 effective January 31, 2008, to January 31, 2009, to NVIDIA in exchange for a premium of  
10 \$37,500. The GREAT AMERICAN policy provides a third layer of excess coverage over  
11 underlying insurance limits totaling \$51,000,000 in the aggregate on policies issued by National  
12 Union Fire Insurance Company of Pittsburg, Pennsylvania and American Guarantee & Liability  
13 Insurance Company as set forth above.

14 15. In electing to quote and issue the aforementioned policy, GREAT AMERICAN  
15 relied on the representations made by or on behalf of NVIDIA.

16 16. NVIDIA concealed information that was material to the risk being evaluated by  
17 GREAT AMERICAN prior to binding coverage or issuing the policy.

18 17. At no time during the application process did NVIDIA disclose to GREAT  
19 AMERICAN: (1) the fact that it was experiencing high or epidemic field failure rates in  
20 connection with its GPUs sold to customers and incorporated into notebook computers that were  
21 failing; (2) that NVIDIA was troubleshooting these major problems with customers in August  
22 2007; (3) that Hewlett-Packard had been sued in the Nygren consumer class action lawsuit; (4)  
23 that Hewlett-Packard had put NVIDIA on notice of its intention to pursue a claim against  
24 NVIDIA in connection with the Nygren matter or, alternatively, to file a cross-complaint against  
25 NVIDIA therein; (5) that Hewlett-Packard had instituted a Limited Warranty Enhancement  
26 Program as a result of NVIDIA chip failures and had asserted a claim against NVIDIA in  
27 connection therewith; or (6) that NVIDIA had placed its 2007-2008 insurers on notice of the  
28 aforementioned matters stated in this paragraph. Instead, these matters were well known to

1 NVIDIA in advance of its first contact with GREAT AMERICAN, should have been disclosed to  
 2 GREAT AMERICAN in connection with its insurance submissions, but said information was  
 3 instead concealed from GREAT AMERICAN.

4 18. Had the true facts been known, GREAT AMERICAN would not have quoted,  
 5 underwritten or issued the GREAT AMERICAN excess liability policy.

6 19. Upon rescission of the excess liability policy, GREAT AMERICAN will restore to  
 7 NVIDIA the policy premium plus the additional taxes paid by NVIDIA.

8 I.

9 **FIRST CAUSE OF ACTION**  
 10 **(Rescission)**

11 20. GREAT AMERICAN reincorporates by reference as though fully set forth herein  
 12 the allegations contained in paragraphs 1 through 19.

13 21. Insurance Code section 331 states:

14 "Concealment, whether intentional or unintentional, entitles the  
 15 injured party to rescind insurance."

16 22. Insurance Code section 359 states:

17 "If a representation is false in a material point, whether affirmative  
 18 or promissory, the injured party is entitled to rescind the contract  
 19 from the time the representation became false."

20 23. Civil Code section 1692 also authorizes GREAT AMERICAN's rescission of  
 21 Policy No. EXE2194521 issued to NVIDIA. GREAT AMERICAN agrees to restore to NVIDIA  
 22 all premiums charged to and paid by NVIDIA in connection with the issuance of GREAT  
 23 AMERICAN Policy No. EXE2194521.

24 24. NVIDIA's failure to disclose and its concealment of facts material to GREAT  
 25 AMERICAN in connection with its underwriting of the excess liability policy and its risk  
 26 assessment justifies GREAT AMERICAN's rescission of coverage. The rescission of coverage is  
 27 timely, valid, and effective retroactively rendering the policy totally void and unenforceable from  
 28 the outset such that there was never any coverage and no benefits are payable there under.

## II.

**SECOND CAUSE OF ACTION**  
**(Declaratory Judgment)**

25. GREAT AMERICAN reincorporates by reference as though fully set forth herein the allegations contained in paragraphs 1 through 19.

26. NVIDIA's misrepresentations and concealment of facts material to the risks insured against under GREAT AMERICAN Policy No. EXE2194521 justifies rescission of the policy, *ab initio*, under California law.

27. GREAT AMERICAN is entitled to a declaration as follows: Policy No. EXE2194521 is rescinded retroactive to its inception date as if no policy had ever been issued and no benefits are payable thereunder.

28. An actual controversy has arisen between plaintiff and defendants herein, and each of them, concerning their respective rights and duties under the insurance excess liability policy issued by GREAT AMERICAN to NVIDIA based on the misrepresentation and concealment of facts by or on behalf of NVIDIA. Defendants, and each of them, incorrectly dispute GREAT AMERICAN's entitlement to the declaratory judgment sought herein.

## III.

**THIRD CAUSE OF ACTION**  
**(DECLARATORY JUDGMENT)**

29. GREAT AMERICAN reincorporates by reference as though fully set forth herein the allegations contained in paragraphs 1 through 17.

30. GREAT AMERICAN Policy EXE2194521, subject to all terms, limitations, and conditions of the policy, provides excess liability insurance coverage (as more fully stated in the policy itself) upon exhaustion of the Underlying Limits of Insurance totaling \$51,000,000.

31. Prior to the issuance of the GREAT AMERICAN excess liability policy, NVIDIA provided notice to all of its general liability and professional liability insurers for the January 31, 2007 to January 31, 2008, policy period in connection with, at least, the claims and demands arising out of the HP Limited Warranty Enhancement Program.

32. GREAT AMERICAN is informed and believed and thereon alleges that



subsequent to the issuance of the GREAT AMERICAN excess liability policy that NVIDIA asserted various claims for liability coverage to all of its general liability and professional liability insurers for: (1) the January 31, 2007 to January 31, 2008, policy period: and (2) the January 31, 2008 to January 31, 2009, policy period. Said claims included, but are not necessarily limited to, those that have been asserted against NVIDIA by numerous Original Equipment Manufacturers, Original Design Manufacturers, and in the multiple consumer class action complaints that have been filed against NVIDIA.

33. To date, NVIDIA has been sued (or has received a demand for indemnity) in numerous class action lawsuits (hereinafter "The Consumer Class Actions") including, but not limited to, the following:

Complaint Filed on Or About	Title of Action	Venue and Case No.
August 8, 2008	<u>Poirier v. Dell and Nvidia</u>	W.D.Pa. 2008, CV-01118 RCM <sup>1</sup>
September 12, 2008	<u>Todd Feinsten v. Nvidia Corporation</u>	Santa Clara County Superior Court Case No. 108CV122610
September 12, 2008	<u>Steven Nakash v. Nvidia Corporation</u>	N.D.Cal. No. C08-4312 MEJ
September 15, 2008	<u>Inicom Networks v. Nvidia, Dell and Hewlett-Packard</u>	N.D.Cal. Case No. C08-04332
September 23, 2008	<u>Louis Olivios v. Nvidia, Dell and Hewlett-Packard</u>	E.D.N.Y. Case No. CV08 3895
October 29, 2008	<u>Milosz Sielicki v. Nvidia and Dell</u>	W.D.Tex. Case No. A08CA 802SS
November 6, 2008	<u>Jordan Cormier v. Nvidia</u>	N.D.Cal. Case No. C08 0582
November 14, 2008	<u>National Business Officers Association, Inc. v. Nvidia, Dell and Hewlett-Packard Company</u>	N.D.Cal. Case No. CV08 5179
November 18, 2008	<u>Brent West v. Nvidia Corporation</u>	N.D.Cal. Case No. C08 05217

<sup>1</sup> This complaint has been voluntarily dismissed without prejudice.



Complaint Filed on Or About	Title of Action	Venue and Case No.
November 18, 2008	<u>Mark Miesel v. Apple, Inc.</u>	N.D.Cal. Case No. 5:2008 CV 04393

34. In addition, NVIDIA has been named as a defendant in at least two securities class action lawsuits brought on behalf of all purchasers of NVIDIA common stock between November 8, 2007, and July 2, 2008, alleging that NVIDIA knew, for at least a period of approximately eight months before disclosed to the public, that NVIDIA chips were failing at excessively high rates and that its chips were defective due to an unknown root cause. (Lisa Miller v. Nvidia (N.D.Cal. Case No. 5:2008CV04261; Patrick Jermyne v. Nvidia (N.D. Cal. Case No. C08 04344.)

35. GREAT AMERICAN is informed and believes and therefore alleges that NVIDIA incorrectly claims that the damages sought in The Consumer Class Actions, by the OEM Demands, and ODM Demands are covered by the GREAT AMERICAN excess liability policy and that GREAT AMERICAN has an obligation to indemnify NVIDIA for all loss, damage, settlements and/or judgments accordingly.

36. None of the claims, demands, actions, causes of action and damages asserted against NVIDIA in The Consumer Class Actions, or by the ODM Demands and OEM Demands are covered by the GREAT AMERICAN excess liability policy. (Policy No. EXE2194521.)

37. All of the claims, demands, actions, causes of action, settlements, damages, and potential judgments asserted against NVIDIA in the consumer class actions, the ODM Demands and OEM Demands are excluded from coverage by the following:

**GENERAL ENDORSEMENT**

**Professional Liability Exclusion**

This policy does not apply to any liability, damage, loss, cost or expense arising out of any breach of duty, negligent act, error or omission of any insured or of any person for whose acts any insured is legally liable in the conduct of your business designated below:

DESIGNATED BUSINESS: Analysis, design, development or manufacturing of an electronic component, system or program resulting in its failure to perform the function or serve the purpose intended.

1 This exclusion does not apply to Bodily Injury, Property Injury,  
2 Personal Injury or Advertising Injury defined in underlying policies  
scheduled on this policy.

3 All other terms and conditions of this policy remain unchanged.”

4 38. All of the claims, demands, actions, causes of action, settlements, damages, and  
5 potential judgments asserted against NVIDIA in the consumer class actions, the ODM Demands  
6 and OEM Demands are also excluded from coverage by the exclusion entitled:

7 “D. **Damage to Impaired Property or Property Not**  
8 **Physically Injured** (Exclusion D(1),(2);

9 39. All of the claims, demands, actions, causes of action, settlements, damages, and  
10 potential judgments asserted against NVIDIA in the consumer class actions, the ODM Demands  
11 and OEM Demands are also excluded from coverage by the exclusion entitled:

12 “F. **Damage to Your Product** (Exclusion F)”

13 40. All of the claims, demands, actions, causes of action, settlements, damages, and  
14 potential judgments asserted against NVIDIA in the consumer class actions, the ODM Demands  
15 and OEM Demands are also excluded from coverage by the exclusion entitled:

16 “K. **Expected or Intended Injury** (Exclusions K)”

17 41. All of the claims, demands, actions, causes of action, settlements, damages, and  
18 potential judgments asserted against NVIDIA in the consumer class actions, the ODM Demands  
19 and OEM Demands are also excluded from coverage by the exclusion entitled:

20 “R. **Recall of Your Product, Your Work or Impaired**  
21 **Property** (Exclusion R(1)(2) and (3))”

22 42. GREAT AMERICAN is informed and believes and thereon alleges that NVIDIA  
23 incorrectly contends that neither the “Professional Liability Exclusion” nor the other exclusions  
24 referenced in the preceding paragraphs do not apply, either in whole or in part, to any of the  
claims asserted against it.

25 43. The GREAT AMERICAN excess liability policy provides no coverage for any  
26 loss, damage, harm, settlements, attorney’s fees, litigation expenses or any other claims arising  
27 from or related to The Consumer Class Actions, OEM Demands, ODM Demands or any related  
28 NVIDIA internal expenses.

## IV.

**PRAYER FOR RELIEF**

GREAT AMERICAN prays for judgment against defendants, and each of them, as follows:

**FIRST CAUSE OF ACTION**

1 GREAT AMERICAN Policy No. EXE2194521 issued to NVIDIA is rescinded retroactive to January 31, 2008, and that said rescission effectively renders the policy totally unenforceable from the outset as if no policy was ever issued, that there was never any coverage, and that no benefits are payable thereunder;

2. For costs of suit herein incurred; and

3. For such other relief as the court may deem just and proper under the circumstances.

**SECOND CAUSE OF ACTION**

1 For a declaration that GREAT AMERICAN Policy No. EXE2194521 issued to NVIDIA is rescinded retroactive to January 31, 2008, and that said rescission effectively renders the policy totally unenforceable from the outset as if no policy was ever issued, that there was never any coverage, and that no benefits are payable thereunder;

2. For costs of suit herein incurred; and

3. For such other relief as the court may deem just and proper under the circumstances.

**THIRD CAUSE OF ACTION**

1. For a declaration that the GREAT AMERICAN excess liability policy provides no coverage for any loss, damage, harm, settlement, attorney's fees, litigation expenses or any other cost or expense arising from or related to The Consumer Class Actions, OEM Demands, ODM Demands or any related internal expenses incurred by NVIDIA.

2. For costs of suit herein incurred; and

///

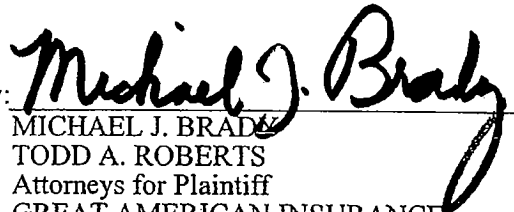
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1           3.       For such other relief as the court may deem just and proper under the  
2 circumstances.

3  
4 Dated: January 23, 2009

ROPERS, MAJESKI, KOHN & BENTLEY

5  
6 By:

  
MICHAEL J. BRADY  
TODD A. ROBERTS  
Attorneys for Plaintiff  
GREAT AMERICAN INSURANCE  
COMPANY OF NEW YORK

Ropers Majeski Kohn & Bentley  
A Professional Corporation  
Redwood City